

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NICHOLAS JAMES JACKSON,

Defendant-Appellant.

UNPUBLISHED

October 21, 2003

No. 242050

Oakland Circuit Court

LC No. 2001-177534-FC

Before: Whitbeck, C.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendant Nicholas Jackson appeals as of right his jury trial convictions for three counts of first-degree criminal sexual conduct.¹ The trial court sentenced Jackson to 12 to 20 years in prison for each count. We affirm.

I. Basic Facts And Procedural History

Jackson was charged with three counts of criminal sexual conduct involving his step-brother, AMH. At the time of the incident, Jackson was nineteen years old and AMH was nine years old. Jackson is the son of Dolores Hines, who was married to Anthony Leroy Hines (Hines), now deceased. Hines was the father of AMH and Ashley Hines. As a result of his mother's inability to properly care for him, AMH had lived for a time with his grandmother, Cheryl Ward, but in 1998 or 1999, AMH moved in with Hines and Dolores Hines in their two-bedroom apartment in Waterford. During this time, Jackson moved back and forth between his mother's apartment in Waterford and his father's apartment in Kentucky.

On November 16, 2000, Jackson came from Kentucky to Michigan to visit his mother and stepfather, and to attend his niece's birthday party. Since the apartment in Waterford only had two bedrooms, Jackson would stay in AMH's bedroom on a mattress on the floor when he came to visit. Jackson arrived at approximately 10:00 p.m. and visited with Hines, Delores Hines, and AMH for a few hours. At approximately 12:00 a.m., Jackson and AMH went to Meijer, where Jackson bought AMH a toy, and returned at 2:00 a.m. Hines and Dolores Hines

¹ MCL 750.520b(1)(a).

went to bed at approximately 2:30 a.m., at which time the boys were still awake in AMH's bedroom.

According to AMH, after he fell asleep, he was awakened by Jackson, who was standing next to his bed naked. Jackson demanded that AMH "suck his dick" and threatened to kill him if he did not obey. Jackson then told AMH to take off his clothes and get into bed with him, again threatening physical force. Jackson performed fellatio on AMH and AMH performed fellatio on Jackson until he ejaculated. While this was occurring, Hines opened the door to AMH's bedroom and saw Jackson's penis in AMH's mouth. Both boys were naked. When Hines opened the door, Jackson pushed AMH off of him. Hines separated the two boys and brought AMH into his bedroom to question him about what he just witnessed. AMH was hesitant at first but finally admitted to Hines and Dolores Hines that Jackson was forcing him to have sex.

The rest of that night AMH slept on the couch and Jackson slept in AMH's bedroom. The next morning, on November 17, 2000, AMH went to school and Hines went to the Waterford Police Department at approximately 8:00 a.m. to report the incident. Hines spoke with Officer Charles Biggs about what he had witnessed. Officer Biggs observed that Hines was very emotional, even crying at times, while speaking with him.

Shortly after the incident was reported, Officer Biggs and Detective John Grimm, a sexual assault specialist at the Waterford Police Department, went to Hines' apartment to question Jackson. Jackson and Delores Hines were the only people home when the police arrived. When Officer Biggs and Detective Grimm told Jackson and Dolores Hines that they were there to investigate the criminal sexual conduct alleged by AMH, Dolores Hines appeared to be surprised and denied having any knowledge of the incident. Jackson agreed to accompany the officers back to the police station to answer questions. Jackson also denied having knowledge of sexual contact and made a written statement indicating that he fell asleep, and fifteen to twenty minutes later, he woke up to find Hines standing at the door and AMH, who was naked, jumping off of him. Jackson's statement also indicated that AMH was alleging that he was having sex with him, and that Jackson did not know why AMH would allege such a thing.

After interviewing AMH, the police had an interview specialist interview Jackson again. During this interview, Jackson made another written statement, this time indicating that when he woke up, AMH's head was under the covers and that it felt like AMH had Jackson's penis in his mouth. Jackson indicated that right at that moment, Hines opened the door and AMH jumped back into his bed. Jackson looked under the covers and saw that his penis was hanging out of his underwear.

Hines died on August 5, 2001. On November 26, 2001, Jackson pleaded guilty to all three counts of first-degree criminal sexual conduct. However, Jackson later changed counsel and withdrew his guilty plea. Before trial, a motion was made by the prosecutor to exclude any evidence with regard to sexual abuse allegations by Ashley Hines or by AMH against anyone other than Jackson pursuant to MCL 750.520j and MRE 402. Jackson filed a motion to exclude Hines' statements made to the police and to admit prior false allegations of sexual abuse made by AMH pursuant to MRE 401, MRE 404, and MRE 804(6). The trial court granted the prosecution's motion and denied Jackson's motion. Jackson then filed a motion for reconsideration, arguing that he wanted to admit prior false allegations of sexual assault by AMH

and preclusion of such evidence would unconstitutionally abridge his rights of confrontation. The trial court denied Jackson's motion. Jackson then filed a motion for stay pending appeal that the trial court also denied. Jackson then filed an application for leave to appeal to this Court, which this Court denied for failure to persuade the Court of the need for immediate review.²

At trial, in addition to the foregoing account of the incident in question, AMH also testified that three or four months earlier, Jackson had demanded that AMH suck his penis, and AMH complied. During the same occurrence, according to AMH, Jackson also slightly penetrated AMH's rectum with his penis, but gave up when he could not insert it all the way. The jury convicted Jackson of three counts of first-degree criminal sexual conduct.

II. Admission Of Statements Of A Deceased Witness

A. Standard Of Review

Jackson argues that the trial court abused its discretion when it ordered that the oral and written statements of a deceased witness were admissible pursuant to MRE 803(2) and MRE 803(24). We review the trial court's determination of evidentiary issues for an abuse of discretion.³ "Close questions arising from the trial court's exercise of discretion on an evidentiary issue should not be reversed simply because the reviewing court would have ruled differently."⁴ The trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion.⁵

B. Excited Utterances

According to MRE 803(2), an excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." In applying this rule, the availability of the declarant is immaterial.⁶ "The rule allows hearsay testimony that would otherwise be excluded because it is perceived that a person who is still under the 'sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any utterance will be spontaneous and trustworthy.'"⁷ "It is the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited utterance rule."⁸ Though the lapse of time between the event and the utterance is an important factor in determining whether the declarant was still under stress, it is

² *People v Nicholas Jackson*, unpublished order of the Court of Appeals, entered May 6, 2002 (Docket No. 240953).

³ *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998), citing *People v Adair*, 452 Mich 473, 482; 550 NW2d 505 (1996).

⁴ *Smith*, *supra* at 550, citing *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

⁵ *Smith*, *supra* at 550.

⁶ MRE 803.

⁷ *Smith*, *supra* at 550.

⁸ *Id.* at 551.

not the only factor.⁹ It is necessary to consider the reason for delay.¹⁰ “The trial court’s determination whether the declarant was still under the stress of the event . . . [should be] given wide discretion.”¹¹

Here, Hines, who is now deceased, made statements to Officer Biggs six hours after observing AMH being sexually molested by Jackson. Hines’ statements to Officer Biggs arose out of a startling event, his observation of Jackson’s penis in AMH’s mouth. Hines also uttered these statements while still under the stress of observing the event. Officer Biggs testified that when Hines was reporting the incident he was very emotional, even crying at times. Jackson’s argument, that since six hours had passed before Hines reported the incident, his statements do not constitute an excited utterance, is without merit. The Michigan Supreme Court commented that it is necessary to consider the reason for delay.¹² The incident occurred at approximately 2:30 a.m. Hines reported the incident at 8:00 a.m. that same morning. The fact that Hines waited a few hours to report the incident is not alone sufficient to conclude that he was no longer under the stress caused by the event. Since Hines reported the event as soon as possible, and since Officer Biggs testified to Hines’ emotional status while reporting the event, there is sufficient evidence to conclude that Hines was still under the stress of witnessing the sexual assault on AMH when he made the statements to Officer Biggs.

Jackson also argues that Hines’ statements were not spontaneous, but rather, were the product of questioning by the police. This argument is also without merit. Hines went to the police station voluntarily to relay the event that he had witnessed. There was no evidence that his statements were made as a result of questioning by the officers. The Michigan Supreme Court has held that “whether a statement made in response to questioning should be excluded under MRE 803(2) depends on the circumstances of the questioning and whether it appears that the statement was the result of reflective thought.”¹³ In making this determination, the Court looked to the suggestiveness and persistence of the person questioning the declarant.¹⁴ There was no evidence presented in this case that Officer Biggs was either suggestive or persistent in questioning Hines about the event he witnessed, nor was there evidence to suggest that Hines’ statements resulted from the stress of the officer’s questioning.

C. The “Catch-All” Rule

We also conclude that Hines’ statements are admissible pursuant to MRE 803(24), the “catch-all” rule. According to MRE 803(24), the following are not excluded by the hearsay rule, regardless of whether the declarant is available as a witness:

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 552.

¹² *Id.*

¹³ *Id.* at 553.

¹⁴ *Id.*

[a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

To comply with the Sixth Amendment Confrontation Clause, hearsay statements offered pursuant to MRE 803(24) must occur under “‘particularized guarantees of trustworthiness’ . . . [based on] the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief.”¹⁵ Courts have looked at several factors when determining that the statements of a deceased person were admissible under the catchall hearsay exception. These factors include: (a) the statement was made voluntarily; (b) the statement was given to law enforcement authorities, who were likely to investigate further; (c) the declarant agreed to assist police in the investigation, which indicated that he knew the veracity of his story would be tested; (d) the declarant was not responding to leading questions or undue police influence when the statements were made; (e) the declarant witnessed “first-hand” the events in his statement; and (f) the declarant had no incentive to manufacture a statement.¹⁶

Here, the prosecution offered Hines’ statements as evidence of the material fact that AMH had been performing oral sex on Jackson. Hines’ statements were more probative on the point for which they were offered than any other evidence because he was the only eyewitness to the events other than AMH and Jackson. Hines was the only person who could corroborate AMH’s testimony. With the admission of Hines’ statements, Jackson could not reasonably deny that sexual activity took place. Also, the general purpose of these rules and the interests of justice were best served by admission of the statements because these statements provided trustworthy evidence of what happened. Hines’ statements were trustworthy in that they were made voluntarily. Hines was not responding to leading questions or undue police influence when the statements were made. Hines gave the statements to law enforcement authorities, who were likely to investigate further, thus indicating that he knew the veracity of his story would be tested. Hines also witnessed “first-hand” the events in his statement and, since Jackson was a member of the declarant’s family whom Hines trusted to sleep in the same room as AMH, Hines had no incentive to manufacture a statement against Jackson.

Jackson’s argument, that since Hines was unavailable because of his death any statements made by him must be admitted pursuant to MRE 804, is also without merit. There are currently no Michigan Rules of Evidence or published opinions stating that an unavailable declarant’s statement must be admitted under MRE 804. In fact, MRE 803 states that the availability of the declarant is immaterial. Therefore, so long as a statement meets the requirements set forth under MRE 803, it will be admissible, regardless if the declarant is available to testify. Since Hines’ statement need not have been admitted under MRE 804, it is not necessary to address Jackson’s

¹⁵ *People v Lee*, 243 Mich App 163, 175; 622 NW2d 71 (2000).

¹⁶ *Id.*

claim that his Sixth Amendment right of confrontation was violated when the MRE 804 “catch-all” hearsay statements were improperly admitted.

III. The Rape-Shield Provisions

A. Standard Of Review

Jackson argues that the trial court erred when it ordered that any evidence with regard to prior sexual abuse allegations made by the victim were excluded pursuant to MCL 750.520j and MRE 402. We review the decision to admit evidence under the rape-shield statute for an abuse of discretion.¹⁷

B. The Purpose Of The Rape-Shield Provisions

The purpose of the rape-shield statute is to exclude evidence of a victim’s prior sexual assault where the defendant wishes to use that evidence to establish that the victim was promiscuous, or to establish other character traits about the victim.¹⁸ However, this Court has noted:

[T]he rape-shield statute does not preclude introduction of evidence to show that a victim has made prior false accusations of rape. Such false accusations are relevant in subsequent prosecutions based upon the victim’s accusations because the fact that the victim has made prior false accusations of rape directly bears on the victim’s credibility and the credibility of the victim’s accusations in the subsequent case, and preclusion of such evidence would unconstitutionally abridge the defendant’s right of confrontation.¹⁹

Here, Jackson sought to introduce evidence that AMH had made a prior false allegation against his mother’s live-in boyfriend, that he later informed his mother that the allegation was false, and that he had been instructed by his grandmother to make the allegations in order to assist her in obtaining custody of him. This information is relevant in that it directly bears on AMH’s credibility and the credibility of his accusations in this case. However, pursuant to MRE 403, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading to the jury.” The trial court did not find that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. It concluded that the evidence was not relevant and excluded it under MRE 402. But since the evidence was relevant, to the extent that the trial court relied on MRE 402 in excluding the evidence, the trial court erred.

Also, to the extent that Jackson was able to introduce evidence that AMH made a prior false accusation of sexual assault, and to the extent that the trial court relied upon the rape-shield

¹⁷ *People v Hackett*, 421 Mich 338, 349; 365 NW2d 120 (1984).

¹⁸ *People v Williams*, 191 Mich App 269, 272; 477 NW2d 877 (1991).

¹⁹ *Id.*, citing *Hackett*, *supra* at 348-349.

statute in excluding the evidence, the trial court again erred. However, Jackson has not made the requisite offer of proof to justify introduction of the evidence. Therefore, even though the evidence was relevant, Jackson is not entitled to a reversal of his convictions.

For a victim's prior false accusations of rape to be admitted, a defendant must follow the procedures set forth in MCL 750.520j, which requires that the defendant make an offer of proof with regard to the proposed evidence and to demonstrate its relevance.²⁰ "If necessary, the trial court should conduct an evidentiary hearing in camera to determine the admissibility of the evidence, and at the hearing, the trial court has the responsibility of restricting the scope of cross-examination to prevent questions that would harass, annoy, or humiliate the victim and to guard against fishing expeditions."²¹

Here, as in *Williams*, the defendant failed to offer any concrete evidence to establish that the victim made prior false allegations of sexual assault. Rather, what defense counsel offered was his own testimony that he was going to put AMH's mother and ex-boyfriend on the stand and question them under oath concerning the falsity of the prior allegations. Defense counsel had no concrete evidence indicating whether the prior allegations were true or false, and had no basis for believing that the prior allegations were false. In essence, "if defendant has evidence of a prior false allegation, that [evidence] could be presented to the court. But defendant was not entitled to have the court conduct a trial within the trial to determine whether there was a prior accusation and whether that prior accusation was true or false."²²

In sum, the trial court erroneously relied on MRE 402 in concluding that evidence of AMH's prior allegations of sexual assault was not relevant and relied too heavily on the rape-shield statute. However, we conclude that the trial court reached the correct conclusion in excluding evidence of AMH's prior allegations of sexual assault because defense counsel failed to make the requisite offer of proof. Because the trial court "reache[d] the right result, albeit for the wrong reason," reversal is not warranted.²³

Affirmed.

/s/ William C. Whitbeck

/s/ Kathleen Jansen

/s/ Jane E. Markey

²⁰ *Williams*, *supra* at 273.

²¹ *Id.*

²² *Id.* at 274.

²³ *People v Lyon*, 227 Mich App 599, 612-613; 577 NW2d 124 (1998).